IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

v. CRIMINAL CAUSE NO. 3:14cr111HTW-FKB

CECIL MCCRORY

DEFENDANT'S REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION TO WITHDRAW GUILTY PLEA

COMES NOW, the Defendant, Mr. Cecil McCrory, by and through his undersigned counsel of record, and files pursuant to Fed. R. Crim. P. 11(d)(2)(B) this, his Reply to the Government's Response [Ct. Doc. No. 98] to the Defendant's Motion to Withdraw Guilty Plea [Ct. Doc. No. 92]. In his Motion to Withdraw Guilty Plea, the defendant stated that there exist fair and just reasons for this Court to grant him pursuant to Rule 11(d)(2)(B) permission to withdraw his previously-entered guilty plea and proceed to trial in this case. The defense argued two primary bases that justify the withdrawal of Mr. McCrory's guilty plea. The most significant fair and just basis for withdrawal is that McCrory did not receive close assistance of counsel prior to, and during, his plea of guilty. Secondly, Mr. McCrory argues that the fact that the Government failed to provide Mr. McCrory a significant amount of discovery materials, many of which have exculpatory value and some of which are still yet to be disclosed to the defense, prior to the entry of his plea. The third justification for withdrawal is that the Government applied undue pressure on Mr. McCrory and misled him in order to persuade him to enter his guilty plea. Mr. McCrory's motion proffered those three reasons in support of his Motion and analyzed his request for withdrawal under the relevant factors this Court must consider pursuant to *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir.

1984) and its progeny. On December 19, 2016, the Government filed its Response to Mr. McCrory's subject Motion. Rather than respond directly to the three primary bases Mr. McCrory urged as fair and just reasons that warrant a withdrawal of his guilty plea, the Government in its Response simply re-typed and regurgitated the statements the defendant made during his Rule 11 plea colloquy without much more. In fact, the Government attempts to summarily dispense with Mr. McCrory's arguments concerning the Government's misleading statements about the Court's availability to take Mr. McCrory's plea and wholly ignores its failure to comply with its discovery disclosure requirements prior to the entry of Mr. McCrory's plea of guilty. The defense now addresses the Government's averments on those points.

In its Response, the Government seems to ask this Court to ignore the specific allegations the defendant's raises in his Motion to Withdraw and make its decision on whether the grant that motion based solely on the averments Mr. McCrory made during his plea colloquy. Although the defense concedes that the plea colloquy with certainly relevant to the Court's analysis of this issue, that colloquy is only a portion of the Court's inquiry. To hold otherwise would defeat the purpose of that provision. *See United States v. Davis*, 428 F.3d 802, 806-07 (9^{th} Cir. 2005) ("A fair reading of the broad language of Rule 11(d)(2)(B) … establishes that a defendant need not prove that his plea is invalid in order to meet his burden of establishing a fair and just reason for withdrawal"). Mr. McCrory's Motion to Withdraw Guilty Plea expressly stated that his plea was facially valid. His argument, however, was that there were fair and just reasons for this Court to permit the withdraw of his plea despite this Court's compliance with the strictures of Rule 11 during his plea colloquy.

In its responsive brief, the Government summarily dismisses its former counsel's untoward conduct in pressuring Mr. McCrory to plead guilty. As the defense states in its Motion to Withdraw, Attorney Mike Hurst told Mr. McCrory that he had to plead guilty by February 25, 2015, two days prior to his qualifying deadline to run for Attorney General for the State of Mississippi, and he accomplished that by convincing Mr. McCrory and his prior attorney that that was the only time available for this Court to handle that hearing. Exh. "A", "B", and "C". Exhibit "A" to this Motion shows that on February 4, 2015, Attorney Hurst emailed a deputy clerk charged with maintaining and setting this Court's calendar to inquire about setting a plea hearing, specifying his intention to have those two pleas during the last week of February 2015. Exh. "A". The immediate response to that inquiry was that the Court was in trial during that week and could conduct the hearings during the following week, the first week of March 2015. Exh. "A". Of course, with the qualifying deadline for the Attorney General's race being February 27, 2015, that date would have been too late to conduct those pleas if the aim for those pleas was for them to be set prior to, or on the day of, the qualifying deadline. Attorney Hurst's response, then, was to attempt to arrange those pleas for the week following February 6, 2015, which would have still permitted Attorney Hurst to conduct the hearings prior to February 27, 2015. Exh. "A". Exhibit "B" demonstrates that on February 10, 2015, the deputy clerk emailed Attorney Hurst to say that of the dates Attorney Hurst had specified the Court would like to set the pleas for February 25, 2015 at 9:30am and asks Attorney Hurst to confirm whether that setting would work for the parties. Exh. "B". Not one minute went by before Attorney Hurst then emailed Mr. McCrory's prior counsel and told him that he had been told that February 25, 2015, at

9:30am was the only time available for the Judge, even though the deputy clerk had already made clear in prior emails to Attorney Hurst that other dates and times in March 2015, at least, were available for the pleas. Exh. "C" and "A". At the hearing of this matter, the undersigned anticipates that there will be testimony that the deputy clerk never told Attorney Hurst that February 25, 2015, was the only time this Court was available for the subject guilty plea. The undersigned also anticipates that other emails and statements in the undersigned's possession will corroborate Mr. McCrory's version of Attorney Hurst's representations about the time and date of plea and this Court's availability concerning when Mr. McCrory pleaded guilty and also concerning when the defendant was arraigned and his indictment was unsealed.

The Government also fails to address Mr. McCrory's point that the Government did not disclose to the defense vast amounts of discovery until more than one year after Mr. McCrory had pleaded guilty in this matter. Moreover, the Government's Response ignores the fact that, to date, Mr. McCrory still has not received many volumes of documents from at least four companies that were disclosed to the Government, but not to the defendant. As the Government stated during the most recent hearing before the Court, the Government intends to use those documents against Mr. McCrory at sentencing, even though Mr. McCrory has not had the benefit of reviewing those materials. The Government's failure to provide the defense documents and evidence that impact Mr. McCrory's guilty or innocence and his sentencing more than one year after his guilty is, even by itself, a fair and just reason for permitting the withdrawal of his guilty plea. That failure impacted not only the voluntariness and knowingness of his plea, but it also affected the delay in filing his Motion to Withdraw.

WHEREFORE PREMISES CONSIDERED, Mr. Cecil McCrory respectfully requests this Court enter an order permitting him to withdraw his guilty plea and allowing him to proceed to trial on the merits of this case.

RESPECTFULLY SUBMITTED, on this, the 21st day of December, 2016.

CECIL McCRORY

/s/ E. Carlos Tanner, III

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CERTIFICATE OF SERVICE

I, E. Carlos Tanner, III, do hereby certify that on this date, December 21, 2016, I have electronically filed the foregoing Reply to the Government's Response in Opposition to His Motion to Withdraw Guilty Plea with the Clerk of Court for the United States District Court for the Southern District of Mississippi using the ECF system, which caused notification of that filing to be sent electronically to all counsel of record in this cause.

ON THIS, the 21st day of December, 2016.

/s/ E. Carlos Tanner, III

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